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Nos. 91-261 and 91-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Petitioner,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.,*
Respondents.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC.,
Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.,*
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the National Labor Relations Act preempts a state agency that is not in the construction industry from entering into and enforcing an agreement with a union that does not represent (or seek to represent) the agency's employees to require private construction employers to recognize that union and abide by the terms of a labor agreement between the union and another employer, under penalty of debarment from a $6.1 billion market.

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INTEREST OF THE AMICUS CURIAE

The Associated General Contractors of America, Inc. ("AGC") is a private, nonprofit trade association founded in 1918 to represent the national interests of general construction contractors. AGC members perform work on both private and public construction projects.

AGC has 100 state and local chapters, with at least one chapter for each State and one chapter in Puerto Rico. Many of AGC's chapters have been and remain the vehicle for collective bargaining with unions that represent construction craft workers. At the same time, AGC and its chapters have represented and continue to represent the interests of construction contractors that are not signatories to collective bargaining agreements.

Because of the breadth and diversity of its membership, AGC is in a unique position to inform the Court about the important construction industry labor law and preemption issues raised by this case. Indeed, AGC has participated in other cases before this Court raising similar questions concerning the construction industry provisions of the National Labor Relations Act. *See, e.g.*, *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982); *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). The parties have consented to the filing of this brief.[1]

STATEMENT OF THE CASE

1. The Massachusetts Water Resources Authority ("MWRA") is a governmental agency created by the Massachusetts legislature.

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Court.

Pet. App. 3a.[2] MWRA is authorized to provide water supply services, sewage collection, and treatment and disposal services for the eastern half of Massachusetts, and is charged with effecting a ten-year, $6.1 billion series of projects for a court-ordered clean-up of the Boston Harbor. *Id.* To this end, the MWRA furnishes funds for construction (assisted by state and federal grants), owns the property upon which building will occur, establishes bid conditions, and makes all contract awards to contractors performing construction on the project. *Id.* at 3a, 74a.

In April 1988, the MWRA retained Kaiser Engineers, Inc. ("Kaiser") as its program/construction manager for the Boston Harbor clean-up project. Pet. App. 3a-4a, 74a. Kaiser's primary function as program manager is to manage and supervise the construction activity on the project. *Id.* at 4a, 74a. Kaiser is also responsible for advising the MWRA about the development of labor relations policy on the project. *Id.*

2. When work in Boston Harbor began, the MWRA allowed both collective bargaining and open shop contractors to perform the work. J.A. 72-74. In November 1988, however, two member unions of the Building and Construction Trades Council ("Trades Council"), a coalition of 34 different unions in the local building and construction trades, picketed the project in order to protest the use of non-union labor by a contractor and, as a result, precipitated a brief work stoppage. Pet. App. 4a; J.A. 73. In response, Kaiser and the MWRA set up a reserve gate system, and thereby established separate entrances to the job site for employees of other contractors. Pet. App. 4a. Shortly thereafter, the work stoppage ended. *Id.*

The MWRA thereafter determined that Kaiser should negotiate a master labor agreement with the Trades Council. Pet. App. 5a,

[2] Unless otherwise specified, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 91-274.

75a. Kaiser and the Union understood that no agreement could be implemented without the MWRA's express approval. *Id.* On May 22, 1989, the Trades Council and Kaiser, "on behalf of" the MWRA, entered into such an agreement -- the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement (the "Master Labor Agreement"). *Id.* at 107a.

The Master Labor Agreement recognizes the Trades Council "as the sole and exclusive bargaining representative of all craft employees" on the project, and makes its hiring halls the initial and principal source for the project's labor force. Pet. App. 6a. It subjects all construction employees on the project to union security provisions, and requires that they become union members within seven days of their employment. *Id.* The Agreement also provides that employees must seek redress for their grievances only through the recognized labor organization, and that all contractors will be bound to the Council's wage, benefit, seniority, apprenticeship, job classification and other rules. *Id.* It further requires that all contractors make contributions to "union benefit trust funds." *Id.* Finally, the Agreement acknowledges that it is "the policy of the [MWRA] that the construction work covered by this Agreement shall be contracted to Contractors who agree to execute and be bound by the terms of this Agreement." *Id.* at 5a, 109a. The Master Labor Agreement expressly excludes employees of the MWRA from its coverage, and denies that Kaiser and the MWRA are "joint employers." *Id.* at 114a, 116a.

On May 28, 1989, the MWRA approved the Agreement. Pet. App. 5a, 75a. On that same day, the MWRA ordered that Bid Specification 13.1 be added to the specifications applicable to all construction work in Boston Harbor. *Id.* Bid Specification 13.1 provides that each contractor, as a condition of being awarded a contract, will abide by the provisions of the Master Labor Agreement. *Id.* at 5a, 72a, 141a. Thus, although MWRA must award all contracts and subcontracts to the lowest responsible and "qualified" bidder, to be so "qualified," a contractor must agree to follow the provisions of the Master Labor Agreement. *Id.* at 141a.

3. Following the issuance of Bid Specification 13.1, respondents filed this suit alleging, among other things, that the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 151 *et seq.*, preempts the actions taken by MWRA in entering into an agreement with the Trades Council to impose the Master Labor Agreement on private construction employers through Bid Specification 13.1. Pet. App. 72a; J.A. 15, 22-23. The district court, however, found that respondents were unlikely to succeed on the merits and denied a requested injunction. Pet. App. 76a-77a.

4. On appeal, the First Circuit sitting *en banc* reversed and remanded for further proceedings. The court found that "the state's intrusion into the bargaining process" was "pervasive" and that, by "mandat[ing] that a labor agreement be reached before a bid is awarded, . . . dictat[ing] with whom that agreement is going to be entered, and specif[ying] what its contents shall be," the MWRA has in fact "*eliminate[d]* the bargaining process altogether." Pet. App. 17a (emphasis in original). As between Kaiser and the Trades Council, the court accepted that the Master Labor Agreement was a valid labor contract under Sections 8(e) and (f) of the Act, but found that the validity of that agreement did not itself justify Bid Specification 13.1's interference with the organizational and collective bargaining processes that are the subject of the Act. Pet. App. 24a-25a.

5. In dissent, Chief Judge Breyer started from the premise that, were a private party letting these construction contracts, the NLRA would have permitted it to take the actions that MWRA had taken here. Pet. App. 32a. Chief Judge Breyer did not believe that, in such circumstances, an intent to preempt could reasonably be inferred from the Act. *Id.* at 41a, 45a.

SUMMARY OF ARGUMENT

I. The NLRA largely displaces all state regulation of industrial relations. Pursuant to *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), states are preempted from

regulating activity that the NLRA protects, prohibits, or arguably protects or prohibits. Pursuant to *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), states are preempted from regulating activity that Congress intended to be unregulated by any governmental authority. Both forms of preemption are implicated by this case.

By agreeing with the Trades Council to make employment on the Boston Harbor project the price of an employee vote to decertify the Trades Council, the MWRA has encumbered employee rights under Section 8(f) to reject a construction industry labor union and to cancel union security provisions. By agreeing to condition bidder eligibility on recognition of the Trades Council, the MWRA has encumbered the right of private contractors to compete without coercion from persons outside the construction industry. And, by imposing the agreement between Kaiser and the Trades Council on all contractors working in Boston Harbor, the MWRA has eliminated the free and uninhibited organizational and collective bargaining processes that Congress meant to leave unregulated. The former state actions are preempted by *Garmon*; the latter state action is preempted by *Machinists*.

The MWRA's actions are not saved from preemption by recognized exceptions for state minimum employment standards, *see Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), or for state actions pursuing wholly "local interests," *see Wisconsin Dep't. of Industry v. Gould, Inc.*, 475 U.S. 282 (1986). As the Solicitor General ironically concedes, those exceptions do not apply to state actions which, like the MWRA's actions, directly conflict with the NLRA's provisions or apply only to organizational and collective bargaining processes reserved by the Act to the parties. Nor is it relevant that the MWRA has acted in an allegedly proprietary capacity through its bidding regulations rather than pursuant to its police powers. States may not take actions, in any form, that conflict with the NLRA or interfere with its policies.

II. Petitioners' argument that the MWRA's actions are saved from preemption because Sections 8(e) and (f) of the Act permit private property owners or developers to agree with construction industry unions to impose project labor agreements on construction industry employers is unfounded. The construction industry proviso to Section 8(e) and Section 8(f) apply only to employers "in the construction industry" and to those employers "engaged primarily in the building and construction industry." A private owner/developer that hires a general contractor to manage, coordinate and oversee a construction project, and that does not itself control the method and manner of construction, is not such a construction industry employer.

In all events, this Court's decision in *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), makes it clear that a mere third-party purchaser of construction does not fall within the Section 8(e) proviso. A private third-party purchaser of construction in the same position as the MWRA has, like the employer in *Connell*, no present or expected collective bargaining relationship with the union. *Connell* holds that union signatory requirements may not be enforced in such circumstances since Congress did not intend, in Sections 8(e) and (f), to allow unions to engage in such "top-down" organizing through a "stranger" employer, or to allow unions to extend their limited statutory monopoly power into the business end-product markets.

Petitioners have provided no persuasive reasons for extending the protection of the Section 8(e) proviso or Section 8(f) to third-party purchasers of construction. The MWRA is not in a "joint employer" relationship with Kaiser, and therefore cannot properly have Kaiser's shelter under the construction industry provisions imputed to it. Moreover, the inherent economic power of such a third-party purchaser, especially on market project of this size and type, is precisely the concern that led the Court in *Connell* to hold that hot cargo agreements with "stranger" employers are outside the protections of the proviso. Furthermore, there appears to be no evidence to establish that the

pattern of collective bargaining in the construction industry in 1959, which Congress intended to preserve in enacting the proviso, included restrictive secondary contracting agreements between construction industry unions and third-party purchasers. To the contrary, there is every reason to believe that such arrangements are novel organizing tactics that were first developed by unions in the early 1970s, and then extended to third-party purchasers only in the mid-1980s.

ARGUMENT

No one disputes that the NLRA permits a state agency to negotiate and enter into a collective bargaining agreement with a union that represents the agency's own employees. But the agreement of the MWRA and the Trades Council that is at issue here does not concern the wages, hours or other terms and conditions of employment of the MWRA's public employees. As the court below expressly noted (Pet. App. 19a-21a, 24a-25a), the MWRA is not here defending its role as a public employer entering into such an agreement. MWRA's employees are not represented by the Trades Council, and MWRA does not have a collective bargaining relationship with any of the construction industry unions in this case.

Nor is there any dispute that the NLRA permits private construction industry employers to negotiate project labor agreements that include broad subcontracting clauses and thereby establish the wages, hours and other terms and conditions of construction craft employment on public as well as private construction projects. On the contrary, the court below accepted (Pet. App. 24a) that Kaiser was free to negotiate such an agreement on this public construction project.

The court below only held (Pet. App. 17a-21a, 24a-25a) that the NLRA preempts the construction contract specification that the MWRA and the Trades Council agreed to use here (1) to mandate that private construction industry employers establish a bargaining relationship with a designated union, and (2) to dictate the terms

of that relationship, under penalty of debarment from a $6.1 billion market. Contrary to the claim of petitioners and their *amici*, this holding is neither startling nor perverse. It prevents "top-down" organizing in the construction industry "to an extent not contemplated by Congress." *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 268 (1983), citing *NLRB v. Iron Workers*, 434 U.S. 335, 338 (1978) (*Higdon*). In addition, it ensures that the limited monopoly power that the Act confers on construction industry labor unions cannot be extended into the end-product market (so as to raise consumer prices). *See Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-35 (1975).

In short, it is the argument of petitioners and their *amici*, and not the decision below, that would, if accepted, turn the NLRA on its head. Sections 8(e) and (f) of the NLRA do not permit either a public or a private property owner/developer that is merely purchasing construction from independent contractors to enter into a "hot cargo" or "pre-hire" agreement with a construction industry union.

I. THE NLRA PREEMPTS THE STATE'S EFFORT TO IMPOSE A COLLECTIVE BARGAINING RELATIONSHIP ON PRIVATE CONSTRUCTION INDUSTRY EMPLOYERS AND, FURTHER, TO DICTATE THE TERMS OF THAT RELATIONSHIP.

As this Court has long recognized, the NLRA "largely displaced state regulation of industrial relations." *Wisconsin Dep't. of Industry v. Gould, Inc.*, 475 U.S. 282, 286 (1986). While the Act does not define the precise scope of this displacement, the Court has developed two separate doctrines -- *Garmon* preemption and *Machinists* preemption -- that greatly clarify the extent of implied preemption in the field of labor-management relations. *See Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 110 (1989) (*Golden State II*); *Golden*

State Transit Corp. v. Los Angeles, 475 U.S. 608, 613 (1986) (*Golden State I*).

The Court's decision in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), reveals that the NLRA preempts state regulation of "activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. at 286. The purpose of *Garmon* preemption is to ensure that the Act will be interpreted and enforced by the congressionally designated federal agency, and not by the states. *Garmon*, 359 U.S. at 241-245; *see also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748 n.26 (1985). *Garmon* preemption prevents "conflict in its broadest sense" with the federal scheme. *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. at 286.

Concomitantly, the Court's decision in *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), reveals that the NLRA also preempts state regulation of activity "that Congress intended to be 'unrestricted by *any* governmental power . . . .'" *Id.* at 141 (citation omitted) (emphasis in original). While the NLRA established an equitable process for determining the terms and conditions of employment, the Act generally leaves the outcome of that process to "'the free play of economic forces.'" *Id.* at 140, quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). Thus, *Machinists* holds that state attempts to interfere in conduct that Congress meant to be unregulated "are as inconsistent with the federal regulatory scheme as are such attempts by the [National Labor Relations Board]." *Machinists*, 427 U.S. at 153; *id.* at 149-50; *Golden State II*, 493 U.S. at 110.

As the court below recognized (Pet. App. 15a-21a), both forms of preemption are implicated by this case. The NLRA protects the right of employees to decide whether to have a collective bargaining representative and, if so, who that representative will be. 29 U.S.C. §§ 157, 158(a), (b), 159 (1988). To be sure, the Act permits employers "engaged primarily in the building and construction industry" to negotiate and enter into agreements with

construction industry labor unions before their employees have had an opportunity to express their preferences. 29 U.S.C. § 158(f) (1988). The Act, however, also permits construction industry employees to petition the National Labor Relations Board ("NLRB") to reject or change the union representative that a "pre-hire" agreement imposes on such employees, and to cancel the union security provisions of the agreement. *Id.* In addition, the Act prohibits any employer that is not in the construction industry or that lacks a collective bargaining relationship with a construction industry union from expressly or impliedly agreeing with a union that it will cease doing business with any other person; indeed, the Act prohibits a union from threatening or coercing such an employer to enter into such an agreement. 29 U.S.C. § 158(b)(4), (e) (1988). Finally, the Act protects the right of employers to choose in good faith not to enter into collective bargaining agreements that are unacceptable to them. 29 U.S.C. § 158(d) (1988).

In mandating that all private construction employers seeking to bid on one or more of the projects in Boston Harbor agree to recognize the Trades Council as the representative of their employees, the MWRA has encumbered all of these rights. Specifically, the MWRA has encumbered the employees' Section 8(f) right to reject the Trades Council as their bargaining representative. It has made their employment on the project the price of choosing to decertify the Trades Council. Moreover, by agreeing with the Trades Council to condition contractor eligibility upon recognition of the Trades Council, the MWRA has encumbered the contractors' Section 8(e) right to be free of secondary pressures exerted by third parties outside the construction industry. And, finally, when it then dictated each and every term of the collective bargaining relationship that it had imposed on these private construction employers, the MWRA interfered with -- indeed, eliminated -- the collective bargaining processes that Congress envisioned. Under *Garmon*, the former state actions are preempted; under *Machinists*, the latter state action is preempted.

It is true, as petitioners note (Pet. Br. 23-24), that Congress did not intend the NLRA to create a regime in which employment policies in the private sector would be wholly insulated from all state actions. Thus, where states have imposed general employment standards which do not conflict with the NLRA's provisions, and which are equally applicable in union and non-union settings, the Court has held that the states' actions are not preempted. *See, e.g., Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 753-58; *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 (1987). But where, as here, the states have imposed standards which arguably conflict with the NLRA's provisions or which apply only to the organizational or collective bargaining processes fostered by the Act, the Court has consistently found that those state actions are preempted. *See, e.g., Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. at 288-89; *Golden State I*, 475 U.S. at 619. Indeed, preemption is essential here to prevent the MWRA from facilitating the Trades Council's patent effort (1) to exceed the congressionally imposed limits on a union's power to organize the employees of private construction employers from the "top down," and (2) to extend the union's monopoly power into the end-product market, and thereby raise prices for consumers. *See Connell*, 421 U.S. at 621-35.[3]

[3] Professor Thomas J. Campbell has lucidly explained the economic dangers of permitting such an arrangement between a union and a third-party purchaser such as MWRA:

> The first is that, in dealing with product market effect, a potential for a product market cartel effect is created. This could give labor more of a return than even the maximum value of what labor contributes to output. It would also implicate the competing regulatory regime of antitrust. Second, even if labor does not derive any more total return from such conduct than it could from manipulating elasticities of substitution or other input supply, there is an incidence issue. The redistributive intention of the Labor Act was not an unrestricted license to capture consumer surplus (the benefit consumers enjoy from having to pay less than they are willing to pay for a certain amount of goods), but was directed at producer surplus (the profit derived from sales revenue in excess of costs, including a normal profit).
>
> Admittedly, both kinds of surplus are diminished when a union succeeds in increasing the wage bill, but restraints derived from lowering the elasticity of demand in the product market directly favor the producer over the consumer. By contrast, manipulation of the elasticity of substitution and the elasticity of supply of other factors increases the pressure the union can bring to bear on the employer, which the employer can then pass along to consumers only according to the preexisting elasticity of product demand. Thus, over the years, the Board and courts have restricted the exercise of labor power precisely where economics indicated the victim was most likely a consumer not represented at the bargaining table, rather than management sitting across from the union agreeing to the terms. Consistent with this trend, the rule I suggest is that, in areas of ambiguity, the law ought to be construed to deny labor the power to manipulate the elasticity of final product demand. The statute and its interpretation by the Board and the courts have, in large part, tended in this direction.

T. Campbell, *Labor Law and Economics*, 38 Stan. L. Rev. 991, 1035-36 (1986) (footnote omitted).

The Act does not preempt the states from pursuing wholly "local interests" through means that are "peripheral" to the Act. Thus, as petitioners and the Solicitor General repeatedly argue (Pet. Br. 4-6, 16, 25-26; U.S. Br. 29), the MWRA may legitimately attempt to ensure that potential labor disputes and disruptions do not impede its ability to meet deadlines imposed by a federal court for cleaning up the Boston Harbor. Time is a critical component of much construction, and many private as well as public owners insist upon timely performance by their contractors. As do many private property owners/developers, the MWRA may establish deadlines for substantial or final completion of each contract. It may require bonds or other commitments to ensure that work will be completed in a timely manner. It may pay incentives to contractors for completing their performance ahead of schedule, and it may assess liquidated damages for

delay. It may even proceed with the early phases of a project before it completes the final design, in what is commonly called "fast track" construction. And, if labor disputes arise, it may sanction the use of reserve gates on its property (as the MWRA initially did here). But, as the court below concluded (Pet. App. 29a-30a), in pursuing its legitimate interest in the timely completion of work, the MWRA may not interfere with the construction industry employees' right to choose whether to organize and with the construction industry employers' right to compete free of secondary pressures exerted by third parties outside the construction industry.[4]

Contrary to the rhetoric of petitioners (Pet. Br. 18-19, 21-22, 28-30, 33-36) and, to a lesser extent, their *amici* (*see, e.g.*, U.S. Br. 14, 17-20), it is of no moment that, in so intruding into and interfering with rights conferred by the Act, the MWRA asserts the role of a proprietor and implements its agreements through bid specifications. This Court's preemption decisions make it clear that "the fact that the [government] acted through franchise procedures rather than a court order or a general law . . . is irrelevant to our analysis." *Golden State I*, 475 U.S. at 614 n.5.

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[4] We therefore have no reason to disagree with petitioners (Pet. Br. 35-36) that the Court's preemption decisions would not prevent a city from advising a supplier of taxi services that it will take its business elsewhere if interruptions in services caused by strikes are not halted. The city in such a situation is not singling out a business for special treatment simply because it is or is not unionized, and it is not requiring the supplier to accede to any union demands (since the supplier may, of course, elect to ensure uninterrupted services through the use of permanent replacements or other means). By contrast, the MWRA is singling out businesses for special treatment on the basis of whether they will agree to become signatory to a collective bargaining agreement, and it is requiring them, as a condition of bid eligibility, to accept the union's demands and to compel their employees to join the union. As the Solicitor General concedes (U.S. Br. 19-20 n.14), this Court's decisions would unquestionably require preemption of such state actions outside the construction industry -- *e.g.*, in the taxi service industry.

In fact, the Court has stated that "[t]o uphold [an otherwise improper state action] simply because it operates through state purchasing decisions . . . would make little sense." *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. at 289. As the court below explained: "Allowing a state to impose restrictions upon *all* companies from which it purchases goods or services would effectively permit it to regulate labor relations between private employers and their employees[,] thus totally displacing the NLRA, not just in this Project, but also statewide, and, if the practice were to become generalized, nationally. Indeed, an anti-union state government could allow only non-union employers to bid on state projects, if the state-as-employer argument is to be taken to its extreme." Pet. App. 21a (emphasis in original).

It may be, as petitioners and the Solicitor General argue (Pet. Br. 33-35; U.S. Br. 18-20), that the Court in its prior cases was "not faced . . . with a statute that [could] even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. at 291. But the Court's NLRA preemption cases have consistently stated that "'judicial concern has necessarily focused on the nature of the activities which the State has sought to regulate, rather than on the method of regulation adopted.'" *Golden State I*, 475 U.S. at 614 n.5 (citations omitted). Moreover, as explained above (*supra*, at 13-14), while the states are entitled to respond to local procurement constraints and economic needs, this Court's preemption decisions make it clear that the states may not take any actions which conflict with the provisions of the NLRA or which interfere with the organizational and collective bargaining processes that are the subject of the Act. It is precisely for these reasons that the Solicitor General does "not contend . . . that a State's actions are automatically insulated from preemption under the NLRA whenever it acts as a purchaser of services or other market participant." U.S. Br. 19-20 n.14. Indeed, the Solicitor General concedes that the MWRA's actions here would be preempted if they had occurred "outside the construction industry" or were

otherwise inconsistent with Sections 8(e) or (f) of the NLRA. *Id.* Simply put, there is not, and cannot be, an intelligible exception drawn to NLRA preemption principles merely because the actions of a state government are proprietary in nature.

II. PETITIONERS AND THEIR *AMICI* PROVIDE NO PERSUASIVE REASONS FOR READING THE CONSTRUCTION INDUSTRY PROVISIONS OF THE NLRA TO INSULATE PUBLIC PURCHASERS OF CONSTRUCTION FROM FEDERAL PREEMPTION.

Just as he did in *Golden State I*, the Solicitor General joins with the local government and the relevant unions in arguing (U.S. Br. 14-29; Pet. Br. 18-19, 24-36) that some of a state's proprietary actions should nevertheless be immune from NLRA preemption. Specifically, the Solicitor General joins in the contention that Sections 8(e) and (f) of the NLRA permit private property owners/developers to enter into and enforce project labor agreements. From this basic premise, the Solicitor General and petitioners reason that this Court cannot reasonably interpret the NLRA to preempt state agencies, in their capacity as third-party purchasers of construction, from entering into and enforcing such agreements.

The proposition that the states may *compel* whatever the Act *permits* is frankly both troubling and dubious. Indeed, *Machinists* preemption is designed precisely to prevent the states from so dictating the choices of private parties in the labor-management relations arena. *See Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. at 290-91. No less significant, however, is that the Solicitor General and the petitioners proceed from a false premise: Sections 8(e) and (f) do not authorize private property owners/developers, in their capacity as third-party purchasers of construction, to enter into and enforce project labor agreements.

A. The First Proviso To Section 8(e) And Section 8(f) Only Apply To Employers In The Construction Industry And To Agreements That Result From A Collective Bargaining Relationship.

Section 8(e) makes it an unfair labor practice for "any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees . . . to cease doing business with any other person . . . ." 29 U.S.C. § 158(e) (1988). The "construction industry proviso" to Section 8(e) states, however, "[t]hat nothing in this subsection shall apply to an agreement between a labor organization and *an employer in the construction industry* relating to the contracting or subcontracting of work to be done at the site . . . ." *Id.* (emphasis added). Section 8(f) provides that "[i]t shall not be an unfair labor practice . . . for *an employer engaged primarily in the building and construction industry* to make an agreement . . . with a labor organization of which building and construction employees are members . . . because . . . the majority status of such labor organizations has not been established . . . prior to the making of such agreement . . . ." 29 U.S.C. § 158(f) (1988) (emphasis added). Thus, a typical third-party purchaser of construction, like the MWRA, cannot find any right in Sections 8(e) or (f) to enter into and enforce a project labor agreement.

To begin with, a third-party purchaser does not normally satisfy the requirements of being "an employer in the construction industry" and "an employer engaged primarily in the building and construction industry." There is a consensus among the courts and the NLRB that, to satisfy both of these requirements, the employer's involvement in the construction project must be substantial and much like the normal involvement of a prime or general contractor. There must be evidence that the employer is managing and coordinating the methods, techniques or procedures of construction through employees that it places at the job site. *See, e.g., Clark v. Ryan*, 818 F.2d 1102, 1107 (4th Cir. 1987); *A.L. Adams Constr. Co. v. Georgia Power Co.*, 733 F.2d 853,

854 & n.3, 858 (11th Cir. 1984), *cert. denied*, 471 U.S. 1075 (1985); *Operating Eng'rs Pension Trust v. Beck Eng'g & Surveying*, 746 F.2d 557, 562-64 (9th Cir. 1984). Merely engaging general contractors, providing funding for construction activity, and periodically visiting the construction site for purposes of inspection is not enough. *See A.L. Adams Constr. Co. v. Georgia Power Co.*, 733 F.2d at 854 n.3; *see also, e.g.*, *NLRB v. W.L. Rives Co.*, 328 F.2d 464, 469 (5th Cir. 1964); *Carpenters Local 1149 (American President Lines, Ltd.)*, 221 N.L.R.B. 456, 460-61 (1975), *enf'd.*, 81 Lab. Cas. (CCH) ¶ 13,137 (D.C. Cir. 1977); *Forest City/Dillon-Tecon Pac.*, 209 N.L.R.B. 867, 868, 870-71 (1974), *enf'd in part*, 522 F.2d 1107 (9th Cir. 1975); *Local 1937, Painters and Glaziers Dist. Council No. 51 (Prince George's Center, Inc.)*, 183 N.L.R.B. 37, 38 (1970); *Columbus Bldg. & Constr. Trades Council (Kroger Co.)*, 149 N.L.R.B. 1224, 1225-26 (1964); *Frick Co.*, 141 N.L.R.B. 1204, 1208 (1963). Just as a home owner that engages a general contractor to build a home or to remodel a kitchen is not "an employer in the construction industry" and "an employer engaged primarily in the building and construction industry," neither is the MWRA.

Indeed, a third-party purchaser of construction which, like the MWRA, has no bargaining relationship with any construction industry labor unions cannot plausibly claim the status of a construction industry employer within the meaning of Sections 8(e) and (f). The text of these statutory provisions does not even arguably extend to actions by third-party purchasers of construction. Moreover, this Court has long recognized that the construction industry proviso to Section 8(e) applies only to agreements between a construction industry employer and a union with whom the employer has a collective bargaining relationship. *Connell*, 421 U.S. at 621-635. *See also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 652-54 (1982); *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 873-882 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 976 (1981).

Specifically, in *Connell*, this Court held that subcontracting agreements between a construction industry union and "stranger" contractors -- *i.e.*, contractors with whom the union had no collective bargaining relationship and whose employees the union had no interest in representing -- were not sanctioned by the construction industry proviso and could be challenged under the NLRA and the antitrust laws. 421 U.S. at 626-35. In *Connell*, such a union had picketed certain general contractors with whom it had (and sought) no collective bargaining relationship in an ultimately successful effort to obtain the agreement of those contractors to let subcontracts only to firms that were parties to the union's collective bargaining agreement. *Id.* at 618-19. This Court determined that "[t]his kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id.* at 625. After finding that "[o]ne of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees," the Court further determined that the statute's "careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing." *Id.* at 632, 633. Accordingly, this Court held that the proviso's "authorization extends only to agreements in the context of collective bargaining relationships" and that the proviso did not immunize the challenged agreement or, for that matter, the picketing that preceded it. *Id.* at 633. *See also id.* at 637 n.19.

The facts of this case are even more extreme than the facts of *Connell*, where the employers could at least be said to be "in the construction industry." The MWRA cannot satisfy even that threshold requirement. Further, it has no collective bargaining relationship with any of the construction industry unions that are members of the Trades Council; and the Master Labor Agreement expressly excludes MWRA's employees from its coverage. Pet.

App. 114a-116a. Moreover, the Trades Council has no discernible interest in representing MWRA's employees in the future. Rather, the union is seeking to represent those who work for private construction employers that are bidders on work from the MWRA. Pet. App. 112a. Indeed, as in *Connell*, it was prior picketing and ensuing work stoppages by members of the Trades Council that led MWRA to agree with the Trades Council to dictate the terms and conditions of all labor relations on the Boston Harbor project. Pet. App. 4a.

Even more importantly, the effects of the MWRA's actions are at least as pernicious as those decried in *Connell*. By agreeing with the Trades Council to require all of the participants in a \$6.1 billion market for new construction to recognize the Trades Council, the MWRA has facilitated a massive effort by the Trades Council to organize construction employees from the "top down," irrespective of their wishes. Moreover, the MWRA has allowed the Trades Council to use its monopoly power over labor to prevent open and unrestricted competition by all qualified contractors, in disregard of the cost of the Boston Harbor project for the consumers and taxpayers who ultimately will pay for it. *Connell* makes it clear that the construction industry proviso does not authorize such "top-down" organizing through a "stranger" employer, or any other direct extension of labor's limited statutory monopoly power into the end-product market. *See* 421 U.S. at 624-26, 632-33; *see also Woelke & Romero Framing*, 456 U.S. at 663-64; *Larry V. Muko, Inc. v. Southwestern Pennsylvania Bldg. and Constr. Trades Council*, 609 F.2d 1368, 1372-75 (3d Cir. 1979) (*en banc*), *cert. denied*, 459 U.S. 916 (1982); T. Campbell, *Labor Law and Economics*, 38 Stan. L. Rev. 991, 1033 (1986) (*Connell* stands for the proposition that a union may not direct pressure "against a *consumer* of the services provided by the employer with whom the union has a bargaining relationship, unless the union is seeking to organize the employees of such a consumer" (emphasis in original)).

B. Sections 8(e) And (f) Of The NLRA Do Not Allow Third-Party Purchasers Of Construction To Enter Into Agreements With Construction Industry Unions To Limit Competition Among Construction Industry Employers.

Amazingly, petitioners and their *amici* do not even discuss the limitations of the construction industry proviso to Section 8(e) or the equally express limitations of Section 8(f). Nor do they mention *Connell* or its holding that the construction industry proviso to Section 8(e) does not extend to agreements that lie outside any collective bargaining relationship. Indeed, they offer no persuasive reasons for inferring that Congress intended to allow third-party purchasers of construction, public or private, to agree with construction industry labor unions to dictate the labor relations of other employers.

1. Petitioners and their *amici* principally argue (Pet. Br. 20, 24-26, 28-29; U.S. Br. 17-18, 21-22, 22-24) that, since the pre-hire agreement between Kaiser and the Trades Council is lawful, the MWRA's agreement with the Trades Council to enforce that agreement must be as well. In the process, however, they disregard their own frequent admissions that Kaiser is not deciding what work to contract or to subcontract, or to whom. Rather, it is the MWRA that makes all of the contract awards. What lies at the heart of this case are the restrictions that the MWRA has agreed with the Trades Council to impose on the selection of contractors working in Boston Harbor. Since the MWRA has no collective bargaining relationship of its own with the Trades Council and is not a construction industry employer, the MWRA cannot properly claim that its actions are directly immunized under the Section 8(e) proviso and Section 8(f). Moreover, since the Master Labor Agreement makes it clear (Pet. App. 116a) that Kaiser and the MWRA are not "joint employers" (*i.e.*, employers whose operations, employees and control are so intermingled that they may legally be treated as one), the MWRA cannot properly claim that any coverage of Kaiser by the construction industry proviso or Section 8(f) may be imputed to

it. *See South Prairie Constr. Co. v. Operating Eng'rs Local 627*, 425 U.S. 800, 802-804 (1976); *Limbach Co. v. Sheet Metal Workers Int'l Ass'n.*, 949 F.2d 1241, 1260-63 (3d Cir. 1991).

2. Petitioners and their *amici* object (Pet. Br. 20, 24-26; U.S. Br. 21-22, 22-23) that the MWRA exerts no economic pressure on any contractor, subcontractor or employee other than the pressures that inhere in the Master Labor Agreement itself, and then argue that it makes no sense to exclude the MWRA's agreement with the Trades Council to enforce the Master Labor Agreement from the intended coverage of the proviso. This objection ignores the fact that, as a third-party purchaser of construction, especially on a project of this type and size, the MWRA can bring enormous economic pressures to bear on private construction employers -- far above and beyond any pressure that an ordinary general contractor in a collective bargaining relationship with a union can exert. The MWRA has the power to debar and to accept higher prices at the taxpayers' or consumers' expense. *See Larry V. Muko, Inc.*, 609 F.2d at 1372-76; *see generally* Campbell, 38 Stan. L. Rev. at 1032-36. Indeed, it was the potential for excessive secondary pressures that led the Court in *Connell* to hold that a restrictive "hot cargo" agreement with a "stranger" employer is outside the construction industry proviso to Section 8(e). *See Connell*, 421 U.S. at 624-26, 632-33.[5]

[5] Contrary to petitioners' suggestion (Pet. Br. 28-29), it makes no difference whether there is a source of law that would prohibit persons subject to the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, from entering into such restrictive third-party arrangements (although, given the availability of the antitrust laws, we see no reason to concede the point). This Court made it clear in *Machinists* and *Garmon* that, even though public agencies are not "employers" within the meaning of NLRA Section 2(2), and thus not directly subject to the NLRA's prohibitions, the Supremacy Clause makes their actions subject to NLRA preemption. By contrast, RLA employers are not subject to the Supremacy Clause or, because of NLRA Section 2(2), the prohibitions of the NLRA.

3. Petitioners and their *amici* further err in suggesting (Pet. Br. 20, 24-26, 35-36; U.S. Br. 21-22, 22-23) that, if MWRA's actions are held to fall outside the sphere of conduct contemplated by the proviso to Section 8(e) and Section 8(f), third-party purchasers will be denied the right to choose to purchase construction from contractors which have entered into project labor agreements. The MWRA has not, however, made a unilateral decision to purchase construction from contractors that have entered into a project labor agreement. Rather, as petitioners have acknowledged (*see* Pet. Br. 25-29; *see also* J.A. 41), and as the dissent below presumed (*see* Pet. App. 32a ("In return for the MWRA's promise to insist that contractors sign the agreement, the Council has promised the MWRA labor peace throughout the 10-year life of the construction project")), the MWRA has agreed with the Trades Council to condition contract awards on recognition of the Trades Council and acceptance of the labor agreement negotiated by Kaiser and the Council. It is this agreement to organize construction industry employees from the "top down" and to exclude from the bidding competition employers that do not agree to recognize the union that conflicts with the provisions and policies of the NLRA and is preempted.[6]

4. Petitioners and their *amici* protest (Pet. Br. 13-15, 18, 30-33; U.S. Br. 24-28) that Sections 8(e) and (f) were intended to preserve the status quo regarding agreements between unions and employers in the construction industry in 1959 and, further, that project labor agreements between construction industry unions and public and private property owners/developers were pervasive at that time. It is clear that Congress wanted to preserve the

[6] Contrary to the argument of petitioners and the Solicitor General (Pet. Br. 36; U.S. Br. 29), finding preemption here does not mean the end of project labor agreements on public construction projects. It simply means that private construction employers will retain the responsibility for such agreements.

pattern of collective bargaining that existed in the construction industry in 1959. *See Woelke & Romero Framing*, 456 U.S. at 657. But the available evidence does not support the claim that property owners/developers were routinely entering into "hot cargo" agreements with unions in 1959.

Petitioners and their *amici* principally cite to the legislative history of Sections 8(e) and (f) to support their claim that the pattern in the industry in 1959 included such third-party arrangements. *See* Pet. Br. 30-33; U.S. Br. 24-28. But the legislative history at most supports only the proposition that project labor agreements were used on both public and private construction projects. While there is some evidence that some public agencies viewed project labor agreements between construction industry employers and unions as desirable in some contexts, the legislative history does not provide *any* examples of project labor agreements that were subject to the approval of the third-party purchaser and were enforced by that purchaser. On the contrary, as best we can tell from the legislative record, all of the examples brought to Congress' attention were classic subcontracting agreements between a general construction contractor and a union with whom that contractor had a collective bargaining relationship.[7]

Petitioners also cite to two secondary sources and a 1986 Advice Memorandum of the Associate General Counsel of the NLRB to support their claim that the pattern in the industry in 1959 included third-party arrangements like the one in issue here. *See* Pet. Br. 13-15, 18. But the secondary sources and the

[7] It is not clear whether any of the agreements described in general terms in the legislative history cited by petitioners (Pet. Br. 30-33) were as extensive and detailed as the agreement between Kaiser and the Trades Council. Thus, petitioners overstate the degree to which the legislative history supports their assertion that the pattern in the construction industry in 1959 included agreements like the one between Kaiser and the Trades Council.

Advice Memorandum merely suggest that, in some situations, property owner/developers may have supported the use of project labor agreements. These sources do not establish how frequently property owners/developers have done so, whether the owners were mere third-party purchasers when they did so (as opposed to "employers in the construction industry"), or whether the owners/developers had collective bargaining relationships with the unions with whom those project labor agreements were negotiated. These sources thus cannot begin to establish that, in 1959, the accepted industry pattern included agreements that, as here, were conditioned on a third-party purchaser's approval and were to be enforced by a third-party purchaser that had no collective bargaining relationship with the union.[8]

Indeed, the available evidence suggests that such arrangements were not part of the industry pattern in 1959. The Court in *Connell* expressly determined that "stranger" contractor arrangements did not exist in abundance, if at all, in 1959. *See Connell*, 421 U.S. at 627-33. Moreover, both this Court and industrial relations experts have since suggested that this was a "novel organizing tactic" that first developed in the early 1970s.

[8] The Mills quote (*see* Pet. Br. 13-14), published in 1972, cites absolutely no authority for its assertion and gives no indication of the extent of the purported "involvement" of the owner. *See* D. Q. Mills, *Industrial Relations and Manpower in Construction* 40 (1972). The Labor Department study (*see* Pet. Br. 14) expressly states that the agreements discussed "are multicraft agreements, generally signed by the local building trades council and/or all local unions involved, and by the *prime contractors* on the project." U.S. Department of Labor, Labor Management Services Administration, *The Bargaining Structure in Construction: Problems and Prospects*, at 14 (1980) (emphasis added). The Advice Memorandum similarly involves a 1980s project labor agreement between a union and a prime contractor; moreover, no unfair labor practice charge was filed against the owner and the Advice Memorandum expresses no opinion about the propriety of the owner's actions. *See* Pet. App. in No. 91-261, at 98a-99a, 101a-102a.

See Woelke & Romero Framing, 456 U.S. at 653-54 n.8; T. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603, 628 (1976). And, finally, the fact that no case concerning the legality of this kind of third-party purchaser arrangement arose until the mid-1980s reinforces the view that this practice is, in reality, a relatively recent phenomenon.

5. Finally, petitioners err in suggesting (Pet. Br. 36) that Bid Specification 13.1 is not preempted because private construction employers have the option of seeking other work. The fact remains that Section 8(e) prohibits this kind of secondary coercion by a third-party purchaser of construction. It was enacted precisely so that construction industry and other employers would not be faced with such coercion (and so that their employees would be protected against this kind of "top-down" organizing tactic). While the construction industry proviso to Section 8(e) and Section 8(f) create a limited exception, *Connell* makes it clear that the congressional policies against secondary boycotts and "top-down" organizing require that "stranger" arrangements like the one in issue here be excluded from the exception. Thus, it is the petitioners, and not the decision below, who "err[] not, as may often happen, by nudging congressional enactments or legal doctrines somewhat too far, but by abruptly and unaccountably standing them on their head." Pet. Br. 36.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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